Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-167

AMERICAN AIR FILTER COMPANY, INC., *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward T. Tait
Lee A. Rau
John M. Wood
Stuart M. Gerson
REED SMITH SHAW & MCCLAY
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
Attorneys for American Air Filter Company, Inc., et al.

Ira M. Millstein
Mark A. Jacoby
Salem M. Katsh
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for Allegheny Ludlum Industries, Inc., et al.

J. Randolph Wilson
William H. Allen
John S. Koch
Steven S. Rosenthal
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Air Products and Chemicals, Incorporated, et al.

[Additional Counsel Listed Within]

William Simon
Harold F. Baker
David C. Murchison
J. Wallace Adair
John DeQ. Briggs
Stuart H. Harris
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for
American Cyanamid Company, et al.

Richard W. Pogue
James C. Bays
JONES DAY REAVIS & POGUE
1700 Union Commerce Building
Cleveland, Ohio 44115

Mark Elliot Mazo
John C. Reitz
JONES DAY REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for
American Greetings Corporation, et al.

Robert E. Jordan, III
Robert M. Goolrick
Mark F. Horning
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Edward E. Vaill
Donald A. Bright
ATLANTIC RICHFIELD COMPANY
515 S. Flower Street
Los Angeles, California 90071

Attorneys for
Atlantic Richfield Company

Mark F. Horning
STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for
Fairmont Foods Company

J. Stanley Stroud
James R. Henderson
MAYER, BROWN & PLATT
888 17th Street, N.W.
Washington, D.C. 20006
Attorneys for
CPC International, Inc., et al.

Fred L. Woodworth
DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG
400 Renaissance Center
Detroit, Michigan 48243
Attorneys for
Champion Home Builders Co., et al.

James N. Johnson
General Counsel
A. O. SMITH CORPORATION
P.O. Box 584
Milwaukee, Wisconsin 53201

Andrew S. Krulwich
Hadrian R. Katz
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036

Attorneys for
Hoffmann-La Roche Inc., et al.

Philip J. Davis
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D.C. 20006

Donald G. Kempf, Jr.
Joseph F. Coyne
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, Illinois 60601

Attorneys for
Chemetron Corporation, et al.

Peter Fleming, Jr.
Eliot Lauer
Samuel F. Abernethy
CURTIS, MALLET-PREVOST, COLT & MOSLE
100 Wall Street
New York, New York 10005
Attorneys for
Dover Corporation

Theodore A. Groenke
Harold J. Bressler
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

James F. Rill
Kathleen E. McDermott
COLLIER, SHANNON, RILL, EDWARDS & SCOTT
1055 Thomas Jefferson St.
Washington, D.C. 20007
Attorneys for
A.E. Staley Manufacturing Co., et al.

James F. Bromley
MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for
United States Gypsum Co.

Harold S. Barron
Noel C. Crowley
THE BENDIX CORPORATION
The Bendix Center
Southfield, Michigan 48076
Attorneys for
The Bendix Corporation

Arloe Mayne
General Counsel
ASHLAND OIL, INC.
Ashland, Kentucky 41101

Ronald P. Wertheim
GINSBURG, FELDMAN & BRESS
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for
Ashland Oil, Inc.

Milton J. Schubin
Richard C. Seltzer
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for
GAF Corporation

Daniel K. Mayers
Neil J. King
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

James R. DeVita
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
Attorneys for
The Babcock & Wilcox Company, et al.

James M. Porter
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115

William C. Collishaw
COX LANGFORD & BROWN
21 Dupont Circle, N.W.
Washington, D.C. 20036
Attorneys for
White Consolidated Industries, Inc.

Samuel K. Abrams
Wilbur L. Fugate
MORISON, MURPHY, ABRAMS & HADDOCK
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for
Cone Mills Corporation, et al.

David B. Lytle
HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Attorneys for
Hughes Tool Company, et al.

Ramsay D. Potts
Steven L. Meltzer
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for
Emerson Electric Co.

Milton Wolson
Edwin Silverstone
SCM CORPORATION
299 Park Avenue
New York, New York 10017

S. White Rhyne, Jr.
MULLIN, CONNOR AND RHYNE
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for
SCM Corporation

Sidney B. Wertheimer
WEISMAN, CELLER, SPETT, MODLIN,
WERTHEIMER & SCHLESINGER
425 Park Avenue
New York, New York 10022
Attorneys for
Fedders Corporation

Jesse P. Luton, Jr.
John E. Bailey
Kevin F. Cunningham
The Law Department
THE GULF COMPANIES
P.O. Box 3725
Houston, Texas 77001
Attorneys for
Gulf Oil Corporation

Joseph W. Burns
BURNS, VAN KIRK, GREENE & KAFER
521 Fifth Avenue
New York, New York 10017
Attorneys for
Ingersoll-Rand Company

Albert R. Connelly
Andrew D. Postal
CRAVATH, SWAINE & MOORE
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for
Bethlehem Steel Corporation, et al.

Edwin S. Rockefeller
Alan M. Frey
BIERBOWER & ROCKEFELLER
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for
Norton Simon Inc.

Norman Solovay
HOLTZMAN, WISE & SHEPARD
30 Broad Street
New York, New York 10004
Attorneys for
AMBAC Industries, Incorporated

Leonard M. Kessler
KELLEY DRYE & WARREN
350 Park Avenue
New York, New York 10022
Attorneys for
Chrysler Corporation

Charles H. McAuliffe
THOMAS J. LIPTON, INC.
800 Sylvan Avenue
Englewood Cliffs, New Jersey 07632

David J. Lewis
Elroy H. Wolff
SIDLEY & AUSTIN
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for
Kimberly-Clark Corporation, et al.

Legal Department
RORER-AMCHEM, INCORPORATED
500 Virginia Drive
Fort Washington, Pennsylvania 19034
Attorneys for
Rorer-Amchem, Incorporated

Kenneth Schnaper
CRANE COMPANY
Legal Department
300 Park Avenue
New York, New York 10022
Attorneys for
Crane Company

Donald G. McCabe
Anthony B. Barton
HALL, MCNICOL, HAMILTON & CLARK
330 Madison Avenue
New York, New York 10017
Attorneys for
American Maize-Products Company

David C. Trowbridge
HALLMARK CARDS, INCORPORATED
Legal Department
2501 McGee Trafficway
Kansas City, Missouri 64141
Attorneys for
Hallmark Cards, Incorporated

Eve E. Bachrach
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for
C.I.T. Financial Corporation, et al.

Caswell O. Hobbs, III
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for
American Stores Company

Robert J. Pope
CLIFFORD, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for
Continental Group, Inc.
(formerly Continental Can
Company, Incorporated)

Charles Kadish
BREED ABBOTT & MORGAN
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for
Honeywell Inc.

Thomas C. Morrison
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10020
Attorneys for
Johnson & Johnson

Leonard I. Horowitz
THE TIMES MIRROR COMPANY
280 Park Avenue
New York, New York 10017
Attorney for
The Times Mirror Company

Barry Hirsch
LOEWS CORPORATION
666 Fifth Avenue
New York, New York 10019
Attorney for
Loews Corporation

Gilbert H. Weil
Robert L. Sherman
WEIL, GUTTMAN & DAVIS
60 East 42nd Street
New York, New York 10017
Attorneys for
Bristol-Myers Company

John T. Rafferty
NL INDUSTRIES INCORPORATED
1230 Avenue of the Americas
New York, New York 10020
Attorney for
NL Industries Incorporated

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

On August 2, 1978, subsequent to the filing of petitions for writs of certiorari, respondent, Federal Trade Commission ("FTC"), filed in the United States Court of Appeals for the District of Columbia Circuit a motion requesting that that court's mandate be issued forthwith.

On August 3, 1978, the Court of Appeals issued an order that called for the filing of memoranda by the parties directed to certain questions raised by the court.

On September 28, 1978, a panel of the Court of Appeals,* *per curiam,* filed a memorandum opinion and

* The panel consisted of Circuit Judges Bazelon and Spotswood Robinson and District Judge Aubrey Robinson.

issued an order: (1) denying the FTC's motion for issuance of the mandate; and (2) ordering, *sua sponte,* that the district court's orders that are the subject of the instant petitions be stayed pending action by this Court. The memorandum opinion and order are reprinted in Addendum A, *infra,* to supplement the appendix that was submitted with the petition.

The Court of Appeals' grant of a stay was based upon its review of the petitions filed in this Court and its "find[ing] that the issues they tender are substantial." Addendum A at A5, A8.

Respectfully submitted,

Edward T. Tait
Lee A. Rau
John M. Wood
Stuart M. Gerson
REED SMITH SHAW & MCCLAY
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
Attorneys for American Air Filter Company, Inc., et al.

Ira M. Millstein
Mark A. Jacoby
Salem M. Katsh
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for Allegheny Ludlum Industries, Inc., et al.

J. Randolph Wilson
William H. Allen
John S. Koch
Steven S. Rosenthal
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Air Products and Chemicals, Incorporated, et al.

William Simon
Harold F. Baker
David C. Murchison
J. Wallace Adair
John DeQ. Briggs
Stuart H. Harris
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for American Cyanamid Company, et al.

Richard W. Pogue
James C. Bays
JONES DAY REAVIS & POGUE
1700 Union Commerce Building
Cleveland, Ohio 44115

Mark Elliot Mazo
John C. Reitz
JONES DAY REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for American Greetings Corporation, et al.

Robert E. Jordan, III
Robert M. Goolrick
Mark F. Horning
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Edward E. Vaill
Donald A. Bright
ATLANTIC RICHFIELD COMPANY
515 S. Flower Street
Los Angeles, California 90071
Attorneys for Atlantic Richfield Company

Mark F. Horning
STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Fairmont Foods Company

J. Stanley Stroud
James R. Henderson
MAYER, BROWN & PLATT
888 17th Street, N.W.
Washington, D.C. 20006
Attorneys for CPC International, Inc., et al.

Fred L. Woodworth
DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG
400 Renaissance Center
Detroit, Michigan 48243
Attorneys for Champion Home Builders Co., et al.

James N. Johnson
General Counsel
A. O. SMITH CORPORATION
P.O. Box 584
Milwaukee, Wisconsin 53201

Hadrian R. Katz
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
Attorneys for Hoffmann-La Roche Inc., et al.

Philip J. Davis
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006

Donald G. Kempf, Jr.
Joseph F. Coyne
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, Illinois 60601
Attorneys for Chemetron Corporation, et al.

Peter Fleming, Jr.
Eliot Lauer
Samuel F. Abernethy
CURTIS, MALLET-PREVOST, COLT & MOSLE
100 Wall Street
New York, New York 10005
Attorneys for
Dover Corporation

Theodore A. Groenke
Harold J. Bressler
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

James F. Rill
Kathleen E. McDermott
COLLIER, SHANNON, RILL, EDWARDS & SCOTT
1055 Thomas Jefferson St.
Washington, D.C. 20007
Attorneys for
A.E. Staley Manufacturing Co., et al.

James F. Bromley
MACLEAY, LYNCH, BERNHARD & GREGG
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for
United States Gypsum Co.

Harold S. Barron
Noel C. Crowley
THE BENDIX CORPORATION
The Bendix Center
Southfield, Michigan 48076
Attorneys for
The Bendix Corporation

Arloe Mayne
General Counsel
ASHLAND OIL, INC.
Ashland, Kentucky 41101

Ronald P. Wertheim
GINSBURG, FELDMAN & BRESS
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for
Ashland Oil, Inc.

Milton J. Schubin
Richard C. Seltzer
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for
GAF Corporation

Daniel K. Mayers
Neil J. King
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

James R. DeVita
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
Attorneys for
The Babcock & Wilcox Company, et al.

James M. Porter
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115

William C. Collishaw
COX LANGFORD & BROWN
21 Dupont Circle, N.W.
Washington, D.C. 20036
Attorneys for
White Consolidated Industries, Inc.

Samuel K. Abrams
Wilbur L. Fugate
MORISON, MURPHY, ABRAMS & HADDOCK
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for
Cone Mills Corporation, et al.

David B. Lytle
HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Attorneys for
Hughes Tool Company, et al.

Ramsay D. Potts
Steven L. Meltzer
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for
Emerson Electric Co.

Milton Wolson
Edwin Silverstone
SCM CORPORATION
299 Park Avenue
New York, New York 10017

S. White Rhyne, Jr.
MULLIN, CONNOR AND RHYNE
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for
SCM Corporation

Sidney B. Wertheimer
WEISMAN, CELLER, SPETT, MODLIN, WERTHEIMER & SCHLESINGER
425 Park Avenue
New York, New York 10022
Attorneys for
Fedders Corporation

Jesse P. Luton, Jr.
John E. Bailey
Kevin F. Cunningham
The Law Department
THE GULF COMPANIES
P.O. Box 3725
Houston, Texas 77001
Attorneys for
Gulf Oil Corporation

Joseph W. Burns
BURNS, VAN KIRK, GREENE & KAFER
521 Fifth Avenue
New York, New York 10017
Attorneys for
Ingersoll-Rand Company

Albert R. Connelly
Andrew D. Postal
CRAVATH, SWAINE & MOORE
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for
Bethlehem Steel Corporation, et al.

Edwin S. Rockefeller
Alan M. Frey
BIERBOWER & ROCKEFELLER
1625 K Street, N.W.
Washington, D.C. 20006
Attorneys for
Norton Simon Inc.

Norman Solovay
HOLTZMAN, WISE & SHEPARD
30 Broad Street
New York, New York 10004
Attorneys for
AMBAC Industries, Incorporated

Leonard M. Kessler
KELLEY DRYE & WARREN
350 Park Avenue
New York, New York 10022
Attorneys for
Chrysler Corporation

Charles H. McAuliffe
THOMAS J. LIPTON, INC.
800 Sylvan Avenue
Englewood Cliffs, New Jersey 07632

David J. Lewis
Elroy H. Wolff
SIDLEY & AUSTIN
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for
Kimberly-Clark Corporation, et al.

Legal Department
RORER-AMCHEM, INCORPORATED
500 Virginia Drive
Fort Washington, Pennsylvania 19034
Attorneys for
Rorer-Amchem, Incorporated

Kenneth Schnaper
CRANE COMPANY
Legal Department
300 Park Avenue
New York, New York 10022
Attorneys for
Crane Company

Donald G. McCabe
Anthony B. Barton
HALL, MCNICOL, HAMILTON & CLARK
330 Madison Avenue
New York, New York 10017
Attorneys for
American Maize-Products Company

David C. Trowbridge
HALLMARK CARDS, INCORPORATED
Legal Department
2501 McGee Trafficway
Kansas City, Missouri 64141
Attorneys for
Hallmark Cards, Incorporated

Eve E. Bachrach
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for
C.I.T. Financial Corporation, et al.

Caswell O. Hobbs, III
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for
American Stores Company

Robert J. Pope
CLIFFORD, GLASS, MCILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for
Continental Group, Inc.
(formerly Continental Can Company, Incorporated)

Charles Kadish
BREED ABBOTT & MORGAN
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for
Honeywell Inc.

Thomas C. Morrison
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10020
Attorneys for
Johnson & Johnson

Leonard I. Horowitz
THE TIMES MIRROR COMPANY
280 Park Avenue
New York, New York 10017
Attorney for
The Times Mirror Company

Barry Hirsch
LOEWS CORPORATION
666 Fifth Avenue
New York, New York 10019
Attorney for
Loews Corporation

Gilbert H. Weil
Robert L. Sherman
WEIL, GUTTMAN & DAVIS
60 East 42nd Street
New York, New York 10017
Attorneys for
Bristol-Myers Company

John T. Rafferty
NL INDUSTRIES INCORPORATED
1230 Avenue of the Americas
New York, New York 10020
Attorney for
NL Industries Incorporated

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

Misc. No. 76-127

No. 77-1728

IN RE:

FTC Line of Business Report Litigation, *Appellants*
And Consolidated Case Nos. 77-1931, 77-1947, 77-1953, 77-1956, 77-1942 and 77-1944

Misc. No. 76-0126

No. 77-1732

IN RE:

FTC Corporate Patterns Report Litigation, *Appellants*

And Consolidated Case Nos. 77-1930, 77-1943 and 77-1952

BEFORE: BAZELON and ROBINSON, Circuit Judges, and AUBREY E. ROBINSON, JR.*, District Judge, United States District Court for the District of Columbia.

Order

(Filed September 28, 1976)

Upon consideration of the motion of the Federal Trade Commission for issuance of the mandate herein, and of the memoranda in support of and in opposition to the motion, it is, for the reasons expressed in the accompanying memorandum,

ORDERED by the Court that the motion for issuance of the mandate be and hereby is denied; and it is

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Further ORDERED by the Court, *sua sponte,* that the District Court's orders reviewed herein be and hereby are stayed pending action by the Supreme Court of the United States upon the petitions for writs of certiorari directed to this Court's judgment of July 10, 1978.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

No. 77-1728—In re FTC Line of Business Report Litigation

Memorandum

On July 10, 1978, we affirmed a judgment of the District Court which directed compliance with orders that the Federal Trade Commission seeks to have enforced in these companion cases.[1] Eighteen days later, the Clerk of this court was notified that three petitions had been filed in the Supreme Court directed to our action.[2] In cases wherein a petition for certiorari is presented within 21 days from the entry of judgment here,[3] it has long been the Clerk's policy to automatically withhold the mandate pending disposition of the petition.[4] That course he pursued in the instant litigation.

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[1] *In re FTC Line of Business Report Litigation,* No. 77-1728, *In re FTC Corporate Patterns Report Litigation,* No. 77-1732 (D.C. Cir. July 10, 1978).

[2] *American Air Filter Co.* v. *FTC,* No. 78-167 (July 28, 1978); *Goodyear Tire & Rubber Co.* v. *FTC,* No. 78-168 (July 28, 1978); *Deering Milliken, Inc.* v. *FTC,* No. 78-169 (July 28, 1978). See also 47 U.S.L.W. 3070 (1978).

[3] See Fed. R. App. P. 41(b), quoted *infra* note 5.

[4] See D.C. Cir. Handbook of Practice & Internal Procedures 70, 74-75 (1978), stating relevantly:

> [A] petition for certiorari to the United States Supreme Court, filed within the 21-day period, suspends issuance of the "mandate" until the case is disposed of in the Supreme Court.
>
> • • • • •
>
> A petition for certiorari filed before the mandate of this Court is issued stays the mandate until the Supreme Court disposes of the case. This Court upon motion may also stay its mandate prior to the filing of a petition for certiorari. . . . If a petition for certiorari is filed within the term of the stay, the stay continues until the case is disposed of by the Supreme Court. Upon denial of the petition for certiorari, this Court's mandate is to be issued immediately.

The Commission has moved for issuance of the mandate, contending that the Clerk's practice is contrary to Rule 41 of the Federal Rules of Appellate Procedure [5] and Rule 14(b) of the General Rules of this court.[6] Appellants, on the other hand, defend the practice, and indicate that they relied on it in deciding not to request that the mandate be stayed.

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As a panel confronted with a procedural policy of general applicability, we normally would refer this problem to the full court for resolution. Since, however, a majority of our regular active judges have recused themselves from

[5] Fed. R. App. P. 41 states:

> (a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.
>
> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

[6] "A petition for a stay of the issuance of mandate shall not be granted simply upon request. A stay shall not issue unless the petition sets forth facts showing good cause for the relief sought." D.C. Cir. Gen. Rule 14(b) (1978).

participation in these cases,[7] it is obviously inappropriate to solicit their guidance at this time on a question impacting the litigation so directly.[8] Moreover, there is no need for anyone to undertake at this time a resolution of the procedural dilemma the parties have posed, for it is clear to us that were there a motion for stay of the mandate we would be obliged to grant it. We have examined the petitions for certiorari and find that the issues they tender are substantial; resultantly, we must conclude that there exists good cause to justify staying the mandate pending disposition of the petitions. We say this without any inclination toward issuance of such a stay *sua sponte*. Rather, our purpose is to point out that there is no occasion to consider the propriety of the Clerk's automatic retention of the mandate when it is evident in the circumstances here that a stay would be available merely for the asking.

We thus leave the Clerk's action undisturbed, but we hasten to make plain our view that the consequence is simply that the mandate will not issue immediately, and not that appellants could not be called upon to respond to the Commission's directives while the petitions for certiorari are pending. When we ordered replies to the Commission's motion, we instructed all parties to address

> the relationship between a stay of issuance of the mandate and the operation of the District Court's orders granting enforcement of the Federal Trade Commission's report orders; and [the] effect, if any, . . . a stay of the mandate [would] have on the enforcement of the Commission's orders[.]

To insure that no one will be misled by our disposition of the motion, we elucidate the course of our reasoning on that score.

[7] For the information of counsel we noted this fact in our judgment disposing of the appeals.

[8] With the problem adjudicated for the instant cases by today's action, we will ask the Judicial Council for this circuit to settle it for the future. See 28 U.S.C. § 332(d) (1976).

II

The starting point is a resume of the events operative in this connection. The District Court entered final judgment directing obedience to the Commission's Line of Business Report orders within 150 days and with the Corporate Patterns Report orders within 90 days, subject to any extensions by the Commission.[9] The District Court denied motions for stays of these orders pending appeals to this court and we, in turn, did likewise. An application for a stay was thereafter made to the Supreme Court, but only in the *Corporate Patterns Report* case. A temporary stay was granted by Chief Justice Burger, and somewhat later Justice Brennan extended the stay pending "final disposition" of the appeal in that case by this court.

During oral argument before us, appellants urged reconsideration of their motion in this court for a stay of the District Court's enforcement order respecting the Line of Business Report program. After initial Commission extensions of the compliance deadline therefor, we issued a stay until further order to preserve the status quo while the litigation was under submission. When, subsequently, our opinion and judgment affirming the District Court were announced, we directed compliance with the District Court's orders within 30 days thereafter. Within the 30-day period, we granted another stay of those orders to enable consideration of the Commission's motion for issuance of the mandate.

III

Thus coming to the fore is the question whether the Clerk's withholding of the mandate of this court itself operates to stay compliance with the District Court's enforcement orders in these cases. Appellants have foregone any

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[9] *In re FTC Line of Business Report Litigation, supra* note 1 (order of Aug. 3, 1978).

request for a further stay of these orders in the apparent belief that non-issuance of the mandate, standing alone, will have that effect. We do not share that view.

It is well established that the District Court is without jurisdiction to alter a judgment of its own while an appeal therefrom is ongoing.[10] But it is equally clear that the vitality of that judgment is undiminished by pendancy of the appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative.[11] To be sure, for as long as the appellate court retains its mandate it mantains

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[10] *Smith* v. *Pollin*, 90 U.S.App.D.C. 178, 179, 194 F.2d 349, 350 (1952); *Bush* v. *United Benefit Fire Ins. Co.*, 311 F.2d 893, 894 (5th Cir. 1963); *Asher* v. *Harrington*, 461 F.2d 890, 895 (7th Cir. 1972); *In re Fed. Facilities Realty Trust*, 227 F.2d 651, 653-654 (7th Cir. 1955); *Janousek* v. *Doyle*, 313 F.2d 916, 920 (8th Cir. 1963); *Merritt-Chapman & Scott Corp.* v. *City of Seattle*, 281 F.2d 896, 898-899 (9th Cir. 1960); *Petusky* v. *Rampton*, 431 F.2d 378, 381 (10th Cir. 1970), *cert. denied*, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); see generally 9 J. Moore, Federal Practice ¶ 203.11, at 734-736 (2d ed. 1948).

[11] *Hovey* v. *McDonald*, 109 U.S. 150, 161 (1883) ("an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effects"); *Gullett* v. *Gullett*, 85 U.S.App. D.C. 12, 14, 174 F.2d 531, 533 (1949); *Weston Lighting Corp.* v. *Smoot-Holman Co.*, 352 F.2d 1019, 1020-1021 (9th Cir. 1965); *United States* v. *City of Chicago*, 411 F.Supp. 218, 246 (N.D. Ill. 1976), *modified*, 549 F.2d 415 (7th Cir. 1977). See also 9 J. Moore, Federal Practice ¶ 208.03, at 1407-1408 (2d ed. 1948):

> The only consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final, notwithstanding that an appeal is pending. If the judgment awards money or property, it may be executed upon unless stayed; if it awards an injunction, the injunction is effective unless stayed; if it refuses an injunction, the prevailing party may engage in the conduct that was sought to be restrained unless an injunction pending appeal is obtained. . . .

(footnotes omitted).

its jurisdiction over the case,[12] and thus the power to alter the mandate.[13] But non-issuance of the mandate by the appellate court has no impact on the trial court's powers to enforce its unstayed judgment since the latter court has retained that power throughout the pendancy of the appeal.[14]

We could, of course, vacate our current stay of the District Court's orders and thereby restore that court's ability to enforce it. We are constrained, however, under the present circumstances to continue the stay until such time as the Supreme Court disposes of the petitions for writs of certiorari. When, shortly after the cases arrived here, we denied appellants' motions for stays, it was our view that the impediment to the Commission's statutory obligations resulting from materially delayed implementation of these reporting programs outweighed any injury feared by appellants, but conditions have since changed significantly. The appellate process in this court has been completed; the questions presented to the Supreme Court, as we have said, are substantial; and the likelihood is that Supreme Court action on the petitions is relatively near at hand. In light of that Court's decision to issue a stay in *Corporate Patterns Report* for the duration of the appeal here, refusal

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[12] *Burget* v. *Robinson*, 123 F. 262, 264 (1st Cir.), *cert. denied*, 188 U.S. 739, 23 S.Ct. 848, 47 L.Ed. 677 (1903); *Alphin* v. *Henson*, 552 F.2d 1033, 1034 (4th Cir.), *cert. denied*, 434 U.S. 823, 89 S.Ct. 67, 54 L.Ed.2d 80 (1977); *Meredith* v. *Fair*, 306 F.2d 374, 376 (5th Cir.), *order enjoining interference with Court of Appeals mandate and vacating stay*, 83 S.Ct. 10, 9 L.Ed.2d 43 (Black, J., in chambers), *cert. denied*, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed.2d 66 (1962); *Omaha Elec. Light & Power Co.* v. *City of Omaha*, 216 F. 848, 855 (8th Cir. 1914).

[13] *Burget* v. *Robinson*, *supra* note 12, 123 F. at 264; *Omaha Elec. Light & Power Co.* v. *City of Omaha*, *supra* note 12, 216 F. at 856.

[14] See authorities cited *supra* note 11.

to further stay the orders in these cases for the ostensibly short period prior to Supreme Court disposition of the petition hardly seems indicated. In sum, we think the balance of the equities now favors a continued stay of the District Court's orders—so much so that we should act *sua sponte*.